CRIMINAL PROCEDURE.

(REPORT OF COMMITTEE E OF THE INSTITUTE.[1])

WILLIAM N. GEMMILL, Chairman.

During the year, the committee has endeavored to collect certain data concerning the procedure in the criminal courts and courts of appeal of the several states. Blank forms containing certain queries were sent to the chief justices of all of the appellate and supreme courts in this country. The same forms were sent to many of the attorney generals and other prosecuting officers. Replies were received from every state. In some instances the queries were fully answered, in others certain questions remained unanswered. From these answers and from a further examination of the statutes of the several states, the committee has ascertained that a gradual change has taken place in the United States in the methods of prosecuting criminal cases.

I. At one time nearly every state in the Union, by statutory enactment, required that all criminal cases of the grade of felony should be prosecuted by indictment. Gradually many of the states have changed this method of prosecution, so that to-day criminal prosecutions are generally carried on in twenty-four of the forty-eight states by information rather than by indictment. These states are as follows: Indiana, Missouri, North Dakota, Colorado, Florida, Vermont, Arizona, Idaho, Kansas, Connecticut, Oklahoma, South Dakota, Washington, California, Wisconsin, Michigan, Utah, Nebraska, Nevada, Louisiana, Wyoming, New Jersey, Minnesota, Montana.

This list includes the states named in the report of 1910 by Committee "E" with the exception of Oregon, which in that report was

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classed with the states prosecuting by information. Since that time, however, the state of Oregon has turned back to its original method and to-day felonies can be tried there only upon indictment. To the list of 1910, however, must be added the states of New Jersey, Arizona and Nevada; New Jersey and Nevada having by recent legislative enactment changed their form of prosecution from indictment to information, and Arizona having been admitted to the Union since the report of 1910. In a few of the foregoing states it is still necessary that persons charged with crimes the punishment of which may be death must be tried upon indictment. This is the rule in Indiana, Connecticut and Louisiana. In several of the foregoing states felonies may be tried either upon indictment or upon information. Where both methods are allowed, from ninety to ninety-nine per cent of the criminal cases are prosecuted by information. In some states, such as North and South Dakota, Oklahoma and Michigan, a grand jury has not been called in many counties for from eight to ten years. In several states a constitutional amendment will be required before there can be a change in the method of prosecution from indictment to information. This is true in Arkansas, Maryland, New Mexico, West Virginia, New Hampshire, Kentucky, New York, Maine, South Carolina, Massachusetts, Delaware, Rhode Island, Pennsylvania, Ohio, Texas and Tennessee. In a few of the state constitutions it is provided that either of the two methods may be adopted. Other constitutions, as in Illinois and Iowa, provide that the legislature may abolish the grand jury and provide for the trial of all criminal cases upon information. In nearly all of the states the rule yet prevails that no substantial amendment can be made to an indictment after it has been returned by the grand jury. Some states by legislative enactment have provided for minor amendments, and in the following states substantial amendments may be made: California, Mississippi, New Jersey, Oregon, New York, Wisconsin, Louisiana and Connecticut. The usual practice in states where both methods of presentment are permitted, is that when an indictment has been quashed, leave is given to the state's attorney to file an information, charging the same offense set up in the indictment, and the trial proceeds at once to conclusion upon the information. In this way no unreasonable delay is permitted and substantial justice results.

Grand juries to-day, while retaining all the powers they formerly possessed as investigating bodies, do not as a matter of fact perform such function to any large degree. The responsibility of investigating an alleged crime rests upon the state's attorney or other prosecuting officer. He is charged with the duty of preparing the evidence for pre-

sentation to the grand jury and the grand jury usually hears only such evidence as the state's attorney presents, and usually indicts or discharges the accused upon the recommendation of the state's attorney. While in theory the indictment is prepared and drawn by the grand jury, in fact it is prepared wholly by the state's attorney. If a mistake is made it is the mistake of the state's attorney, and not the mistake of the grand jury; yet the ancient rule prevails that an error in an indictment cannot be cured by an amendment, because the indictment being the work of the grand jury, can be amended only by the act of that body. The prosecution therefore fails. There can be no doubt but that much more satisfactory results would be obtained by throwing the responsibility where it belongs, upon the state's attorney, and requiring him, after he has investigated the evidence against the accused, to prepare the charge in the form of an information, which may be amended, when such an amendment can be made in the interests of justice. Rare instances may occur, such as in cases of riot or wholesale corruption, where an investigation of the evidence can be made by a grand jury with greater success than would attend the work of the state's attorney. But these instances will be most infrequent.

This committee therefore endorses the recommendation of the committee of this association for the year 1910, and urges that such legislation be had in the several states as will secure the right of every state to prosecute those accused of crimes either upon information or indictment, and the committee urges that where the method of prosecution by indictment is retained, provision should be made in the law for substantial amendments to such indictments, wherever such amendments can be made in the interests of justice.

II. From the reports obtained from the several states, it is apparent that by far the largest number of reversals in criminal cases by courts of appeal has been due to erroneous instructions given to the jury by the trial court. An examination of the methods of instructing juries in the criminal courts of the several states has revealed the fact that where written instructions are given, reversals on account of erroneous instructions have been much more frequent. In the following states written instructions only are permitted in criminal cases: Illinois, Delaware, Colorado, Missouri, Texas, Washington, Nevada, Iowa, Idaho, Montana, Mississippi, Kansas, Wyoming, Florida, Oklahoma, Utah, New Mexico, West Virginia, Oregon, Nebraska, Kentucky, and Maryland.

Oral instructions in criminal cases are usually given in the following states: Vermont, South Dakota, New Hampshire, New York, Maine, South Carolina, Massachusetts, Georgia, Rhode Island, Louisi-

ana, Pennsylvania, and Connecticut. Either oral or written instructions may be given in the following states: Maine, Wisconsin, Pennsylvania, Connecticut, Ohio, Michigan, Indiana, Arizona, North Carolina, Oklahoma, North Dakota, Arkansas, New Jersey, and Minnesota.

From inquiry it has been ascertained that wherever both methods of instructing juries may be used, it is the usual pr ctice to instruct orally, although the presiding judge has the right to determine which method will be adopted. In England, the judges holding criminal court exercise greater power in charging juries than is permitted in any of the states in this country. There the judges not only instruct the jury orally as to the law, but are given wide latitude in charging the jury as to the weight of the evidence and the credibility of the witnesses. But few of the states in this country have granted such power to trial judges. In the following states the trial judge is permitted to comment upon the facts in criminal cases: New Jersey, Vermont, New Hampshire, New York, Maine, Rhode Island, Pennsylvania, Connecticut, Ohio, and Kansas. In the jurisdictions, however, where oral instructions are permitted and exceptions allowed to be taken at any time to any part of the charge after the jury has retired from the bar, reversals have been but little less frequent than where instructions are in writing.

One of the questions propounded to the chief justices of the several states was as follows: "Give as nearly as you can, the percentage of reversals by courts of appeal in criminal cases of your state for the last five years." A few of the presiding judges did not answer this question. Others answered the question by stating that they had no exact information upon the subject and could give only an estimate. The only states from which the figures given purport to be based upon an actual count of the criminal cases before the court during the last five years are as follows: Wisconsin, Michigan, Illinois, Iowa, California, New Hampshire, Georgia, Massachusetts, Kansas and South Dakota. The following are the figures given by the presiding judges of the several courts:

	Per cent.		Per cent.
Wisconsin	30	Arizona	15
Illinois	37.4	Washington	25
Iowa	26	North Carolina	30
Michigan	31	Idaho	2
Massachusetts	23	Georgia	16
New Hampshire	22	North Dakota	35
Kansas	20	Montana	30
South Dakota	30	Mississippi	15
California	20	Wyoming	12
South Carolina	25	Florida	30

	Per cent.		Per cent.
Maine	1	Oklahoma	30
Delaware	0	Utah	45
Louisiana	10	Arkansas	25
Colorado	40	Maryland	20
Ohio	10	New Mexico	20
Missouri	40	Vermont	5
Texas	30	West Virginia	40
Tennessee	10	Oregon	22
Minnesota	20	Kentucky	10

The effort to ascertain the exact percentage of criminal cases reversed by the several courts has emphasized the pressing necessity for some system whereby actual statistics may be collected and preserved by the proper officers of the several states. But few states have made any effort whatever to collect reliable statistics. In Ohio, Illinois, Texas, Tennessee, North Carolina, Iowa and Wisconsin, some effort is now being made along this line, which is most encouragnig.

Comparisons have frequently been made of the work of the English and American courts. It is frequently asserted that owing to the greater freedom exercised by the judges in the trial of criminal cases in England, substantial and reversible errors seldom are made. This conclusion is not based upon the facts. The following table shows the work of the English Court of Criminal Appeals, which was established in England in 1907 and which heard its first case in May, 1908:

Number of appeals heard and decided from May 1908 to April 3rd, 1912	676	
Applications for appeal refused	180	
Total before the court since its creation		856

The 676 appeals decided were disposed of as follows:

Affirmed	330	
Sentences quashed and defendants discharged	168	
Sentences reduced	174	
Sentences increased	4	
Sentences quashed because of misdirection of jury	103	
Sentences quashed because of insufficient or improper evidence	29	
Sentences quashed because defendant was found not guilty	21	
Percentage of judgments vacated based upon appeals heard		51%
Percentage of judgments vacated based upon appeals heard and applications refused		40%

The English Court of Criminal Appeals has no power to remand a criminal cause for a new trial. This is clearly a weakness in the present constitution of that court and the court has frequently expressed its regret at being unable to remand the defendant for a new trial where

it was evident he was guilty. A serious effort is now being made to secure an amendment to the Court of Appeal's Act, granting to the court the power to remand a cause for new trial. There is no absolute right of appeal in criminal cases in England. When a conviction occurs, a defendant wishing to have a review of his cause must ask the trial court for an appeal; if this is refused he may then apply to the Court of Criminal Appeals, which may or may not grant the application. In more than fifty per cent of the one hundred and three cases wherein the reviewing court reversed the judgment of the trial court because of misdirection to the jury, the misdirection consisted of a misstatement of the evidence; this misstatement often consisted of a failure to place before the jury such evidence as was of advantage to the accused and of emphasizing the evidence against the accused.

Another question that was asked the chief justices of the several states was: "What was the most frequent cause of reversals in such cases?" Such answers as were given are as follows:

Kentucky: Error ininstructions and in admitting evidence.

New York: Errors in instructions.

Texas: Errors in charge.

South Carolina: Errors of the trial judge who sometimes inadvertently expresses himself upon the facts.

Colorado: Erroneous instructions.

Connecticut: Erroneous instructions or improper evidence.

Wyoming: Errors in instructions and prosecutors in insisting on pressing doubtful questions.

Florida: Errors in charges to the jury.

New Mexico: Erroneous instructions.

Oregon: Erroneous instructions and error in the admission of evidence.

Nebraska: Errors in instructions.

Mississippi: Improper instructions.

Kansas: Errors in instructions and admission of evidence.

Minnesota: Improper instructions and insufficient evidence.

Arizona: Erroneous instructions and admission of evidence.

North Dakota: Improper and prejudicial instructions and the admission of incompetent evidence.

California: Erroneous instructions and admission of evidence.

Idaho: Improper instructions.

Missouri: Improper instructions.

North Carolina: Erroneous charge to the jury and improper instructions.

Nevada: Error in instructions and faulty indictments.

Georgia: Errors in instructions and admission or rejection of evidence. Two hundred forty-one felonies heard, thirty-seven reversed.

Washington: Error in instructions.

West Virginia: Erroneous instructions.

Iowa: In 199 appeals, 53 were reversed; 18 for erroneous instructions, 11 for insufficient evidence, 9 for erroneous admission or exclusion of evidence.

Illinois: The guilt of the defendant had not been clearly established; erroneous instructions and improper admission or rejection of evidence; conduct of the trial court or counsel.

Michigan: Over-zealousness of prosecuting attorney, being allowed to make statements that he ought not to make.

South Dakota: Incompetence of state's attorneys.

Vermont: The construction of some new statutes.

Maryland: Improper rulings on evidence.

Oklahoma: Unfairness in the ruling of the trial judge on material questions.

Wisconsin: Twenty-four out of 105 cases reversed; of this number 5 reversed on the merits; 6 for erroneous rulings on evidence, 13 for errors in instructions or refusal to instruct.

Louisiana: Improper arguments of district attorneys and erroneous rulings of trial courts.

New Hampshire: Erroneous construction of statutes under which proceedings are brought.

It can but be apparent that a system which permits the attorneys on either side to hand to the court an almost innumerable number of propositions, oftentimes so cleverly drawn that the error in them may not be easily detected, and require the judge in the short space of time allotted to him for that purpose, to mark as "given" or "refused" all of these propositions and to permit the defeated party to preserve an exception on account of any defect which he may afterwards detect, in an instruction given on behalf of his opponent or refused when offered by him, cannot but make the trial a contest of wits rather than an honest effort to reach a just verdict and judgment.

The committee is of the opinion that it would not be wise to give to trial courts the right to comment to the jury favorably or unfavorably upon the weight of the evidence or the credibility of witnesses; but recommends that such legislation be had as will give to the trial judge the right to charge juries orally and to limit exceptions to such charge to the specific objections made by counsel at the time of the charge, in the presence of the jury and before it has retired from the bar.

III. If punishment for crime is to operate as a deterrent, it must be summary. England denied the right of appeal in criminal cases until the creation of the Court of Criminal Appeal in 1907. Since the establishment of that court its efficiency has frequently been proven and its need demonstrated. The right, however, to appeal in any criminal case should be made to depend upon the case itself, and should be denied unless the party appealing can show to the court some good reason for the step taken. In most of our states there is no abridgment of the

right to appeal in criminal cases. In some states, however, an appeal or writ of error can be prosecuted only after the court, to which the appeal is taken, or from which the writ of error springs, has found that there is probable cause that substantial error was committed in the trial court.

Section 3 of the English Criminal Appeal Act of 1907, is as follows:

"3. A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—

"1st: Against his conviction on any ground of appeal which involves a question of law alone; and

"2nd: With the leave of the Court of Criminal Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and

"3rd: With the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

"4.—(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable, or that it cannot be supported according to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice; and in any other case they shall dismiss the appeal; provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

"(2) Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

"(3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed; and in any other case they shall dismiss the appeal.

"5.—(1) If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the Court consider that the appellant has been properly convicted.

"(2) Where an appellant has been convicted of an offense and the jury could on the indictment have found him guilty of some other offense, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the Court may, instead of allowing or dismissing the appeal, substitute for the

verdict found by the jury a verdict of guilty of that other offense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity."

It is common practice in many of the states to-day, for one convicted of a crime to appeal at once and secure a supersedeas by giving a bond permitting him his liberty until the cause has been finally determined by the reviewing court. Oftentimes the most flagrant violators of the law are thus permitted to prey upon the community for from one to five years pending the final disposition of their causes in courts of appeal. The right to appeal should be limited to cases where the trial court has certified that the case involves doubtful and uncertain questions of law or fact which should be determined by the court of appeal, or where the court of appeal upon an application to appeal should find for any reason that the cause is one where an injustice may have resulted to the appellant.

The committee therefore recommends that such legislation be enacted in the several states as shall limit the right of appeal to such defendants as shall secure from the trial judge a certificate reciting that the cause is one which contains some doubtful or uncertain question of law or fact, or that for some other reason it is one which should be reviewed by the court of appeal. Failing to secure such certificate such defendant should then apply to the court of review for the right to appeal, and such court shall grant such appeal only when it shall be of the opinion that the case is one where an injustice has been done.

IV. Paragraph 3 of Section 4 of the English Criminal Appeals Act provides that when an appeal is heard, if the court thinks that a different sentence should have been passed, it may quash the sentence passed at the trial and pass such other sentence as may be warranted in law by the verdict whether more or less severe in substitution therefor. This is an exceedingly broad provision and gives to that court a power which has enabled it to do justice by passing different sentences from the ones passed at the trial in twenty-five per cent of the cases before the court. Under the common law, an appellate court had power only to affirm or reverse a cause. Nearly every state of the Union has modified the common law in this regard. In some states, appellate courts are given power to amend the judgments of the trial court in criminal cases by passing proper sentences where through mistake or inadvertence an improper sentence was passed. This is substantially the rule to-day in the following states: Michigan, Georgia, Mississippi, New York, Pennsylvania, Tennessee, Texas, Nebraska, Colorado and Alabama. None of the courts, however, in the above named states have the power

to reduce or increase penalties imposed by the trial court when, in the judgment of the court, such action should be taken in the interest of justice. There is no good reason, however, why the broader powers granted in the English Criminal Appeal Act should not be exercised by the appellate courts of this country. Such a power wisely exercised would do so much to lessen the number of cases reversed by the courts of appeal.

The appellate courts of the following states have the right to reduce penalties whenever in the opinion of the court such a course may be followed in the interest of justice: Iowa, North Dakota, Arkansas and Nebraska. The plan has worked well in these states.

All criminal codes pronounce against the specific crimes enumerated in them. The penalties which these codes prescribe are directed against the crime committed and not against the individuals who commit the crimes. No law was ever enacted which could operate automatically and do justice, because no two men having committed the same offense and living under different surroundings, are equally guilty. To the consideration of every criminal case must be brought all the circumstances of the crime, including the environment of the accused, and to the accomplishment of this task may well be added the earnest and conscientious efforts of a court of review. A court of criminal appeals will always operate as a check upon ill-considered judgments of trial courts, and it should have the power not only to reverse such cases when such a course is demanded, but to set aside the erroneous judgments and enter proper judgments where this may be done in the interests of justice to all concerned. It often happens that persons are severely or lightly punished, depending upon the particular judge or particular jury before whom their cases are tried. An appellate court with power to rectify such inequalties of punishments would be a most potent instrument of justice and would bring about a proper standardization of penalties.

To this end the committee recommends that not only should courts of criminal appeal have the power to reduce or increase penalties without reversing causes, where in their judgment such a course is proper, but likewise have the power to set aside the judgment and sentence of the court and pass such other sentence as is warranted by the evidence, having due regard for the rights of all parties involved.

V. The presumption of innocence that obtains in criminal prosecutions is evidence introduced by the law in favor of the accused. This evidence may be overcome by facts admitted or proven upon the trial. The office of a presumption is not to overthrow admitted facts but to

supply the absence of facts. This function ceases the moment the facts are ascertained. A judgment of conviction by a competent court is a solemn determination of the facts overthrowing the presumption of innocence. From this time the only presumption that arises is one of guilt. Courts of appeal should set aside such a judgment only when from a full consideration of the cause, a reasonable doubt exists as to the guilt of the accused. The presumption of innocence permits the accused to stand mute before the trial court without having his motive questioned. When, however, he voluntarily seeks a court of review and there pleads his innocence as a reason why the judgment of conviction should be overthrown, he should be required to submit himself and his cause to such further inquiry as that court sees fit to make. New trials are frequently urged upon the ground of newly discovered evidence. This evidence is submitted to the court by means of affidavits, which usually have no probative force. Courts of review should not only have power to interrogate the accused touching his guilt or innocence but should also have the power to examine such other witnesses presented by the accused as the court may determine. The examination of the accused or his witnesses should rest in the discretion of the reviewing court. The English Court of Criminal Appeal has frequently granted the application of the accused to be heard in person and has more frequently interrogated witnesses offered in his behalf. In many of the cases before that court the judgment of conviction was set aside because of new evidence thus submitted; in many others the judgment of conviction was affirmed in cases where a doubt had arisen in the minds of the court as to the guilt of the accused. The right of the court to hear further evidence upon appeal in criminal cases has long been the established law of Maine and of North Carolina.

The committee therefore recommends that such legislation be enacted as will give to courts of review the power to examine the accused under oath and to hear the evidence of such other witnesses offered on behalf of appellant as the court may elect.

VI. No uniformity exists in the procedure of the several states in reference to the use of the writ of habeas corpus. This ancient writ had its origin at a time ante-dating the Magna Charta, when life and liberty were held in slight esteem by governments and courts. At no time, however, since its origin has its legitimate function been to secure a review of mere errors or irregularities, either as to substantive rights or as to the method of procedure in trial courts. Its sole legitimate purpose is to free the petitioner from an illegal restraint. The judgment of a court of competent jurisdiction, although erroneous, is binding upon

all parties unless reversed and no court of concurrent jurisdiction can by means of the writ of habeas corpus look beyond the judgment for the purpose of re-examining the charge or the method of procedure upon which it is based. Errors and irregularities which do not render the proceedings void are not open to review by the writ of habeas corpus. The remedy in such case is by appeal, writ of error or exceptions. In most jurisdictions the right of the state to appeal from a judgment in a habeas corpus proceeding is denied. This has given rise to startling abuses in many states. Courts of concurrent jurisdiction frequently review each other through the medium of a writ of habeas corpus. This is done in flagrant disregard of the law. Most of the states have enacted statutes upon this subject. Some provide for a review by either party, either by appeal, writ of error or exceptions. In one or two states the court upon entering a judgment in a habeas corpus proceeding is required to certify questions of law presented by either side to the court of appeal. In the following states the right of appeal is granted by statute to both parties from a judgment in a habeas corpus proceeding: North Carolina, Tennessee, Georgia, New York, Massachusetts, Wisconsin, Connecticut, Minnesota, Nebraska, Alabama, Indiana, Vermont, Michigan and Texas. In other states the right to review upon the application of either party is limited to the consideration of certain questions affecting property rights.

The committee recommends the enactment of such legisaltion as will give to both sides, in a habeas corpus proceeding, the right to apply to an appellate court for a review of the judgment, either by appeal, writ of error, certiorari, exceptions, or by a certification of questions of law.

Appendix to Report of Committee E of the Institute; Dissent.

William E. Higgins, University of Kansas.

The writer concurs in all but recommendations two and four of the Report of the Committee, and submits the following in opposition to the two named:

I. Recommendation two is as follows:

"That such legislation be had as will give to trial judges the right to charge jurors orally and to limit exceptions to such charge to the specific objections made by counsel at the time of the charge, in the presence of the jury and before it has retired from the bar."

The recommendation is:

First: A license to the trial court to err with a minimum danger of being detected by counsel and reversed by the reviewing court;

Second: An additional burden which the accused should not be compelled to bear;

Third: A premium upon the ingenuity of defendant's counsel to devise specific objections so as to influence the jury before it retires for deliberation.

The recommendation is divisible into three parts:

1. That the charge be oral;
2. That only the trial court prepare the instructions;
3. That exceptions be limited to such objections as are:
   a. Made immediately following the charge and before the jury retires, and,
   b. In the jury's presence.

First: Shall the charge be oral?

The writer does not believe that oral are better than written instructions, where the following rules are in force:

1. Error, to be reversible, must be prejudicial to the substantial rights of the accused;
2. Such errors must either affirmatively appear or the language of the instruction must be such that the reviewing court is unable to say that the jury was not misled;

   (Note—Practically, in some courts, this amounts to the rule that the language must be of doubtful construction, one that may have erroneously affected the substantial rights of accused, or, it must have affirmatively appeared to have that effect).
3. The instructions must consist of specific applications of the law to the concrete, ultimate facts of the case, and not of mere abstract propositions of law;
4. The reviewing court must test each instruction in connection with the other instructions, regarding the charge as a whole.

On the other hand, the writer believes that written instructions serve the following useful purposes:

1. To compel the trial court to avoid loose and misleading language;
2. To secure greater effort upon the part of the trial court to prepare his instructions so as to cover the whole of the case in the interests of substantial justice;
3. To secure the aid of the criticism and suggestions of counsel, wherever the instructions are submitted to counsel before being given to the jury.

Juries often attach great weight to every word of the trial court in a criminal case; hence, looseness of expression should be avoided. In this day of court stenographers, it is no great burden for the court to dictate the language of his instructions prior to giving them to the jury.

Second: Shall the court alone prepare instructions?

With this the writer agrees, provided, such instructions are submitted to counsel for criticism and suggestion before they are given to the jury, and, provided further, that the court is required to instruct

upon all the vital points of the case. The right of counsel to aid the court by the preparation and presentation of instructions involving defendant's theory of the case has often operated, either intentionally or unintentionally, as a "pitfall" for the court, either by artful language or by the multitude of the instructions. In spite of the rule established by reviewing courts that instructions must be limited in number to the requirements of each case, trial courts have been subjected to the burden of examining many instructions prepared by counsel, until it has become a custom with some courts to "refuse" all such instructions and cover their substance in instructions of the court's own devising. It may be well, therefore, in jurisdictions where such difficulty exists, to deprive counsel of the right to prepare and present instructions. But aid from counsel can be secured by granting the right to inspect the court's instructions and to make criticisms and suggestions. The problem of reform is *not how shall reversals be prevented by allowing the trial court more latitude to err with less danger of detection,* but, *how shall substantial justice be done without reversals which do not affect the determination of the guilt or innocence of the accused.* Counsel can often aid by criticism and suggestion, even though these be wrung unwillingly from counsel. For states in which it is the practice to offer numerous or artfully drawn instructions, the writer proposes the following:

The trial court alone shall prepare written instructions to cover every vital feature of the case, and, when requested, submit them to counsel for criticism, giving reasonable opportunity for that purpose. It shall not, however, be error for the trial court to refuse to follow such criticism or suggestions.

The Kansas code of Civil Procedure provides that in *civil* cases the court shall, upon request of counsel, give reasonable opportunity to inspect the instructions, and this provision might well be made the rule in criminal cases, with the added provision that the court shall prepare all of the instructions.

It is not clear from the committee's recommendation whether reversible error shall be limited to errors of commission in the instructions given and whether the recommendation does not include errors of omission—failures to cover some vital part of the case. To allow him to instruct upon such parts only as he pleases would encourage carelessness and lack of effort in the trial court.

Third: Shall exceptions be limited to such objections as are:

a. Made immediately following the charge and before the jury retires; and,

b. in the jury's presence.

The above has the following objectionable features:

1. It does not give sufficient time for the formulation of specific objections sufficient to constitute the basis of an exception;
2. It will, as a matter of practice, require counsel to make numerous objections, not in the *hope* of securing a reversal, but as an absolute *safeguard* to preserve defendant's rights;
3. It will subject counsel to the danger of unreasonable prejudice of jurors because of the very number of objections, which he may be compelled to make; and,
4. It will place before the jury conflicting views of the law and the facts, thus tending to deprive the trial court of his present power to declare the law of the case, and it will, practically, make the jury the judge between the conflicting views of the court and of counsel.

The provision will not give sufficient time for the formulation of specific objections, for the reason that counsel's impressions of the court's language cannot be made the basis of an exception, since the reviewing court will require that specific objection be made to specific language, and sufficient time is not given for this purpose by this provision. The instruction of a jury should not be a baseball game, in which the court "bats" his ideas to the jury under a rule that errors must be "caught on the fly" or that he will be thrown out at the "home plate" of the reviewing court by an error fielded without an instant's hesitation.

The recommendation will require numerous oral objections in order to safeguard the rights of accused, and at the same time, defendant will be subjected to the prejudice which juries so often have to the numerousness of objections made by counsel.

The provision will place before the jury the instructions of the trial court and the specific objections of counsel in such a way that the jury will retire to the jury room in possession of conflicting views of the court and of the counsel, and some jurors will undoubtedly question the court's instructions in view of counsel's specific objections. No better opportunity could be devised whereby adroit counsel might take advantage of the well known fondness of a certain class of jurors to take the law into their own hands in spite of the juror's oath to follow the law as given by the court. Especially will this be true in cases involving sympathy on account of matters not strictly in evidence but apparent to the eyes and ears of those who sit in the court room. The jury room should not be the forum of the contending views of the court and of counsel, but it is to be feared that this provision will make it such.

Finally, the object of reform is to do justice, and not to minimize the danger of reversing trial courts because of substantial error. Neither is it the object of reform to shift a burden unless the shift results in substantial justice.

Recommendation four is as follows:

"Not only should courts of criminal appeal have the power to reduce or increase penalties without reversing causes, where in their judgment such a course is proper, but likewise have the power to set aside the judgment and sentence of the court and pass such other sentence as is warranted by the evidence, having due regard for the rights of all parties involved."

I do not concur in this recommendation upon the supposition that, as worded, it seeks to give to reviewing courts the power to find ultimate facts of the case. To give any such court any such power, without having the witnesses before it, is to ignore entirely the unspoken, unwritten facts, which so often affect the credibility of witnesses, but which are apparent upon the stand. Reviewing courts might well be given the power to give judgment where there is an absence of any evidence to sustain an ultimate fact showing an element of an offense, as, for example premeditation, in murder in the first degree, and be allowed to give judgment upon all the other ultimate facts showing other elements of an offense included within the verdict of the jury, as, for example, murder in the second degree, where the jury has returned a verdict of guilty of murder in the first degree. Under the language of the recommendation, however, the reviewing court might weigh the evidence and find an ultimate fact not included within the verdict of the jury. With this I cannot agree.

DISCUSSION.

The report was then opened for discussion. Judge Gemmill, the chairman, said:

"The report is printed and approved by all the members of the committee excepting three, and partially approved by them. The committee did not attempt to cover the whole field of criminal procedure. It was the consensus of opinion that we ought to confine our recommendations to a very few subjects, and we therefore took up first what seemed to be the most important, and that was the recommendation of a similar committee of this association two years ago, recommending the change of method of presentation from indictment to information. We made a thorough investigation to see whether or not any such changes were going on in this country. Twenty-four states now prosecute nearly all criminal cases by information rather than by indictment. Oregon, since the last report, has changed from information to indictment.

"The second topic that we took up is the method of instructing juries. You probably cannot find two lawyers who will agree upon the method. Yet we were able in this report to secure the endorsement of the recommendation here, that oral instructions be given to juries, instructing only upon the law, and that exceptions be allowed only when taken in the presence of the jury. * * * Professor Higgins has filed a minority report touching this question of instructions.

"I prepared a list of questions which I forwarded to the chief justices of all the Supreme Courts in the United States and to many district and prose-

cuting attorneys, and one of those questions was aimed at the most frequent cause of reversals in their criminal cases. The answers are published in the report. In nearly every state the cry was that the cause of reversal was erroneous instruction. * * *

"One of the requests I made of the chief justices of the several courts was to give me, if possible, the percentage of reversals in criminal cases in their several states. This question was generally answered. Some of them, like Chief Justice Winslow in your own state, and Chief Justice Carter, based their answers upon exact information. This is true also of Indiana. In many cases, however, the justices said that they had no exact data upon which to make that answer, and their answer was merely an estimate. I wish especially to call your attention to the table in the report showing the percentage of reversals in criminal cases." * * * (See p. above.)

"It has been said in the last few years, through the public press and otherwise, that owing to the absence of a handicap upon the judges in England who try criminal cases, their decisions are seldom or never reversed.

"I examined the complete reports of the English Court of Criminal Appeals, which was established in 1907, and which went into operation May 1, 1908. Our report contains the results of that examination. The generally accepted notion that English courts try their cases with greater certainty than we do, and that their cases are seldom reversed is completely overthrown. As a matter of fact there is a larger percentage of reversals in criminal cases in England than in any state in the Union save Colorado." (See p. above). * * *

"I will not add anything to what I have already said, excepting this, that 103 of the total number of cases reversed by the court of criminal appeals in England were reversed because of misdirection of the jury, and in a very large percentage of those cases the misdirection consisted in a misstatement of the evidence by the trial judge, and the Appellate Court so holds and so states in its opinion.

"This committee believes—I think the committee, with the exception of Professor Higgins, was unanimous on that question—that it is unwise to give to trial judges in criminal cases, the right to comment upon the facts, or to comment upon the guilt or innocence of the accused. Certainly that has not worked out very satisfactorily in England, if this record is to be taken as a criterion. Judges should, however, have the right, and should be limited to the right, of commenting upon the law and doing that orally, and requiring exception to be taken before the jury has retired from the bar."

Professor Higgins: "My dissent is with reference to oral instructions. I concur in the report of the committee, if the committee means that the judge shall not be allowed to comment on the evidence. But I do maintain that an instruction to the jury should contain what we call the ultimate facts in connection with the propositions of law. If these gentlemen in their report have endorsed abstract propositions of law to be stated as instructions to the jury, I am against it; I think that is out of the question. I think that one of the causes of mistrials in this country is that judges in instructing juries, confine themselves to mere abstract propositions of law. And on the other hand, I believe it would be most unwise to allow a man to sit on the bench and instruct the jury as to what we call the evidenciary facts. That will be a large guide

to the jury, who advisedly consider themselves very often as not competent to judge of the evidence, and they will follow the voice, mind and gesture of the judge with respect to it.

"What I do mean is that every proper instruction to a jury should consist of the abstract proposition of law applied concretely to the ultimate facts in the case on each proposition. I feel strongly on this point after an investigation covering a number of years.

"I believe that many judges and lawyers do not study scientific procedure so that they understand the proper function of a trial, and they mix evidence with operative facts in their pleadings and evidence with ultimate facts in their instructions, to the confusion of our procedure and the ultimate reversal of the case. That is the first proposition. I want to make myself clear. There are certainly in procedure conclusions of law, ultimate facts put in issue by the pleadings, and the evidenciary facts to sustain these ultimate facts. A scientific instruction and consideration of these matters by those men who sit in authority on the bench and those who practice at the bar, would tend very largely to simplify procedure.

"I am opposed to the second recommendation for the reasons set forth in the report which you can read; but I think that the report of the majority of the committee is merely favorable to this proposition: That no instruction should be permitted to reverse a case, for if you can remove the opportunity to catch the judge in what is admittedly an error in the case, you are simply allowing the court more latitude to err. And, as I stated, this is merely license to the trial court to err with the minimum chance of detection. Why not say, let him err as much as he pleases and the jury will correct the errors? I do not believe that in many jurisdictions the jury will correct the errors. In that case why have instructions at all? Why not carry the proposition to its legitimate conclusion? I do not understand Judge Gemmill to maintain that proposition at all, of course, but I maintain that if you allow this you might as well allow the rest of it and so let the court err as it pleases.

"But that is not my only objection to it. Before I proceed I want to say that the proposition is not to allow the court to err and not be caught, but how to avoid error and obtain the truth in the case. That is the object of reform.

"To allow counsel to trap the court, is vicious; it must be avoided. In those jurisdictions, therefore, where there is any practice on the part of the bar to offer numerous instructions, with one proposition of law applied to the facts under one form and then revamped under another, there obtains a well established practice of the court to refuse all instructions on the part of counsel and to make them himself. If that is persisted in I concur in the advisability of taking away from counsel the right to offer instructions to the court and predicating error for refusal. But I do believe that the bar of this country should be brought to this standard, viz.: that before the court instructs the jury the court should receive the criticism and advice of the attorneys at the bar in that case, and that opportunity should be given to counsel, therefore, to inspect the judge's instructions which he proposes to give on the ultimate facts of each proposition of law. After the court has recieved the criticism let him do as he pleases; if he wants to take it, well and good.

"Now, the objection to that is, on the part of some, that it consumes time; that you must excuse the jury. But it is better to excuse the jury for a recess and avoid error in a case than to have it sent up and reversed or modified; better to have a final determination of the question by a deliberate attempt to get at the truth, than to labor wholly in the interests of finality and expedition at the risk of reversible error. Therefore, I see no merit in the contention that it will consume time. Under a wise guidance it will consume no more time than is perfectly proper.

"I think that corrections lie not so much in taking away from counsel the opportunity to inspect and to predicate error in three or four days, but in saying this: that no error in instructions shall cause a reversal, unless it is prejudicial to the substantial rights of the defendant and those other safeguards which are here enumerated. If these be thrown around, it seems to me that errors in instruction will be reduced to a minimum. But I want to return to the proposition that if a court errs substantially in a case, and he has given the ultimate facts in his instructions, so that the jury is sure to be bound by the charge, and ought to be bound by it, then that case ought to be reversed. We are not here in the interests of finality; reform is not merely disposing of cases with expedition; it is to be just; and therefore no court should be allowed to sit on the bench and misdirect a jury, and, in the slang phrase of the street, 'get away with it,' if it is fundamental and prejudicial. If we adopt the doctrine that all errors excepting certain ones specified, which do not affirmatively appear to have prejudiced the substantial rights of the defendant, shall be resolved against the defendant's appeal, I think that we shall very largely avoid the trouble.

"The doctrine of requiring an affirmative appearance of error on the part of the defendant in the record, of course, will not be acceded to by a large number of attorneys; whether it is wise or not is a question of debate. I am myself slowly coming to the conclusion that that doctrine is a wise one and that it will avoid a very large number of reversals.

"The reasons which you will find set forth in my dissenting report are apparent to those who are in practice—will bear weight with some and will not bear weight with others. I think I can produce a long list of those who are radically opposed to oral instructions.

"The second objection that I have to the point is this: I may misunderstand the recommendation, but if exceptions are to be taken to an oral charge, and those exceptions are to be taken in the presence of the jury, an adroit counsel can so shape his objections that his theory of the case will go before the jury; and I know from experience that in a good many trial jurisdictions that that jury composed of men who know both counsellors will say: 'Well, I tell you that I think in all common sense the contention of the counsel for the defendant in this case is a more reasonable contention as to the law than the contention of the judge; and I am going to follow it out here.' And you will have transferred from the court room a contention over the law of the case, in the jury room. I think that is the danger and that is my second objection.

"Let me say in passing, that the very valuable table of the causes of reversals secured by Judge Gemmill (and I want to say that Judge Gemmill

has done a large amount of work in collecting the data) is not conclusive, because of this fact: In my own state 20 per cent of reversals are due to erroneous instructions and omission of evidence, as stated by Chief Justice Johnson. Our reversals are 20 per cent of the appeals; that 20 per cent of reversals is composed of nearly 8 per cent of reversals in favor of the state on exceptions taken by the state on what we call a question of reserve, not during the trial, but, for instance, where an information has been quashed.

"So that we will have to go further and find out how many reversals were reversals in favor of the state and not in favor of the accused, before we can say that that is a bad showing for these various states. I say that by way of explanation.

"One other thing in conclusion. I think, gentlemen, that an investigation of this kind is required and we absolutely need a simplified, uniform procedure all over the country; but we absolutely need one thing especially with reference to our attorneys, prosecuting and defending. There should be in every law school in this country a careful education in the fundamentals of practice. I plead that those who are interested in criminal law shall insist that the men who go to the bar for the plaintiff or for the defendant in criminal cases, shall, first, be men who understand the differentia of a conclusion of law, an ultimate fact made by the issues of the case, and the evidence to sustain it. The intermingling of those three things causes confusion and works reversals. The object of a trial is to get the truth. That is the ultimate fact in the case; and if we confuse it with opinions which we should endeavor to avoid, as an opinion is not an ultimate fact, error results. Let the evidence determine the ultimate fact. Clear distinction in this regard constitutes a knowledge of the fundamentals of procedure.

"Second, we want to insist that these men not only have scientific knowledge in that respect, but that their legal ethics shall be such that they will want to keep these things distinct and not intermingle them; and when we do that, it seems to me that together with an investigation such as a committee like this makes, we will have made a large step towards the solution of the determination of the guilt of innocence of the accused, irrespective of passion or prejudice."

Judge Russell, Oklahoma: "In my state we have the practice of information as well as indictment. We have no grand jury, excepting that which the judge sees proper, upon his own motion, to convene, or which may be called upon the application of 100 taxpayers. All crimes can be presented by information by the county attorney. We have no district attorney.

"Upon the subject of points applicable in instructions I have this to say: A man is presented upon a charge of murder. That involves several degrees of homicide. The court hears the evidence. * * * And when it is concluded the jury is placed in charge of the bailiff, and the court asks whether counsel on either side has suggestions to make in argument or propositions of law to submit. If they have, well and good; if not, the court retires and submits the law applicable to that case. If the offense of murder has not been developed by the evidence it is a waste of time and paper to submit the law of murder. If only the issue of murder has been presented by the evidence upon one side, and upon the other, self-defense to the accusation, submit those

two propositions. If there is an intermediary current of manslaughter in a case stripped of deliberate homicide, you submit the law applicable to that as well. Now, there you have your three branches, murder, manslaughter, self-defense. Abstract principles of law should never be encouraged; it is confusing. Only the law applicable to the case raised by the testimony should be submitted. The law applicable to those facts should be submitted without any comment on the part of the judge as to the weight of any particular fact. * * *

"Now, as to instructions. In our state they may be written unless counsel consent to oral instructions. You have a jury of laymen, not of lawyers. The judge gives out orally, principles of law to be submitted; the rights in the case, and turns them over to counsel. Now, as Professor Higgins says, an astute lawyer goes up and inserts his objection in a dogmatic fashion; the jury has heard the oral instruction, but on that particular branch it has gone from their minds, and what that attorney calls their attention to, dominates. When they go to the jury room they have no written instructions; they have to trust to their memories; the last thing they have heard is something that sounds to them good. They go out, but of course if they forget what is said they can call for written instructions. But it won't do, in my judgment; time is always saved when you hear the suggestions from your brother members of the bar who are interested in the case. The court retires to his chambers, submits his instructions; carbon copies, if you please, are handed to the lawyers. Let them draw a cold-blooded bead upon it. If they draw it and you still maintain the position asserted in the instructions after deliberate review and reflection on what they have stated, it relieves the Supreme Court of a world of work. A little extra time may be required down below, but you have saved time in the long run. * * * By pursuing that practice of giving the attorneys the opportunity to make their suggestions. In five years I have had no criminal case reversed on instructions because of error. I never had a civil case reversed because of instructions. I give them time. * * *

"Of course in minor felonies where the issues are very simple, counsel say, 'we consent to oral instructions;' if the jury wants them drawn off they can have them before they return their verdict, if they do not understand them." * * *

Edwin M. Abbott, Philadelphia: "We have one system in the East with regard to the charge of the court which I think should be preserved. In our state and in many of the states of the East, all points submitted for charge by counsel, must be handed in to the trial judge before argument begins; and during all the course of the argument the trial judge has those points before him. Then his charge is given; and under the laws of the state of Pennsylvania, he is compelled to give a full, fair and equitable charge and a fair review of the evidence. Our courts compel the judge also to review all the evidence briefly; and then, if error is made, it is reversible error, if it has been prejudicial to the rights of the defendant. * * *

"Now, just as Judge Russell has said, the court gives the law applicable to each case. He has a tried scientific mind and is supposed to know what is the law in each particular case, and whether it is a case for the jury or not, and how much of law there is to consider upon the facts presented. We try cases upon evidence and only upon evidence, and the court charges the jury

upon evidence, and then when the court goes wrong, we cannot say that there was no wrong caused by a wrongful charge on the law. Our judges must follow the law in their charges to the jury; and if the courts themselves have gone astray, a written charge placed upon the record is the only proper way by which it can be reviewed by the Appellate Court. I therefore am in favor of the continuation of the written charge, so that in case wrong has been done any defendant it may be cured by the Appellate Court."

Charles A. De Courcy, Boston, Mass.: "I wish to consider two very small matters, and I shall not attempt to discuss the general proposition.

"This table in the report giving the number of reversals, is so important and so likely to be quoted at large in these days when so much is said as to the errors of trial courts, that I can but regret that the committee did not secure the figures as well as the percentages. I cannot avoid thinking that to the popular mind this table is misleading and exaggerated. Having in mind my own state, the suggestion that 23 per cent of the criminal trials are reversed seems startling; but when you know that that means that not more than 17 criminal cases were tried in a year before the Appellate Court and not more than four reversed, why, the popular conception of the efficiency of the trial court would be very much different—four cases reversed rather than 23 per cent of the cases. These four cases need to be further explained. It does not mean that in all the four cases in which the finding of the trial court was reversed, the county and the parties are put to the expense and delay of a new trial, by any means. I should say one if not two of the four were reversed because the law upon which the case was tried, the statute or ordinance with the violation of which defendant was charged, is found by the Appellate Court to be unconstitutional. That is a question upon which the trial court would not presume to act, of course. So that when you reduce this down to concrete figures, the number of cases that are not only reversed but sent back for a new trial, as I had occasion to know from an investigation made last year for the American Prison Association, is a very small number of cases, not anything like such a number as might be suggested when put into percentages."

President: "Did you notice that this covers 5 years?"

Judge De Courcy: "Yes. I had occasion to examine the situation in our own state, and I think the number of criminal cases that went to the Supreme Court did not exceed 17 a year in any year during the last 5 years, and I am sure that in some years there were not that many."

President: "Your percentage that you speak of was based on the last year?"

Judge De Courcy: "Yes, but the last five years show no substantial difference. I had occasion to go over the figures and I have them fairly well in mind. They run from a dozen to eighteen cases a year, at the outside; and the proportion of them that were reversed would not be more than four or five of the dozen to eighteen.

"Now, the comments here upon this matter of instructions perhaps seem a little strange to one who has never known the practice of written instructions. With an experience of thirty years at the bar and bench, I have never heard any complaint made against oral instructions; have never known anything else. Of course the stenographer is there and makes an exact transcript

of what the judge says. We have never had any difficulty in meeting the suggested abuse that Professor Higgins speaks of, that after the charge, some shrewd or unscrupulous attorney will get the last word to the jury. That is more dangerous in theory than in practice. I have never known it to be done. It is always the custom after a judge has charged the jury, for counsel who desire to note an exception to the refusal to give some specific request, or to take an exception to some portion of the charge that he does not agree with, to come up with the opposing counsel to the bench, and in whispered conversation which the jury cannot hear, to note the exception; and if any attorney should undertake to make that objection from his seat in order to reach the jury, he would not go very far before the court would see to it that that was a matter that affected only the court and counsel, and not the jury, and of course the lawyer would not be permitted to influence the jury in that way."

Judge Russell: "The court would have the last say on the ruling."

Judge De Courcy: "Yes, but subject to exception. With no knowledge of written charges it is pretty difficult for me to make comparisons. But here are twelve men; in the majority of criminal cases the issues are almost entirely of fact. If the jury have the issue clearly placed before them; if they are instructed as to some of the general principles that will enable them to weigh evidence; if they are put upon their honor to realize that their duty is to get at the truth in the conflicting testimony, there is not much in the way of law in the average criminal case that calls for instruction, and what is given can better be given in the ordinary colloquial manner that a man uses in oral speech easily understood by the jury, stated in a manner calculated to make them understand it, rather than to put in statements of abstract or even concrete principles of law, in phraseology which the average juror does not understand and may entirely misconstrue. The court can explain those things when it comes to the propositions of law. Here is a specific issue raised; the defense is self-defense. If that issue is raised it is a perfectly simple thing to explain briefly what the principle of self-defense means, and concretely, if they believe such and such facts claimed, are proven, that constitutes a perfect defense; and if such and such other facts are proved, it does not. There is no trouble in making the jury understand. I cannot at this moment recall a criminal case where a new trial was granted because of misdirection in the charge. Of course there are some; but they are very few. I must say that, because apparently in this part of the country the written charge is not unusual. Perhaps in respect to the oral charge, since you are not familiar with that practice, the objections may be somewhat theoretical. I have never known any other. It has been in use in our commonwealth for more than a century. I think I can say that it has given universal satisfaction. I have never heard any suggestion of changing to a written charge."

Judge Gemmill: "I am glad Judge De Courcy has made the statement he has. It comports with our own experience and with the general idea of the committee. I want to suggest, however, something in reference to what he said in regard to publishing exact figures as to the reversals in the several states. I am sure the judge will appreciate the fact that that will require a very large amount of work, and only emphasizes the need of some system of statistics.

"Our Supreme Court lately collected statistics for the last ten years of all reversals and other disposition of cases in the Supreme Court, and that will be published within the year. It is to be hoped all courts will do that, and then we will know where we stand.

"But in response to these questions, but two chief justices in the United States complied with the suggestion of Judge De Courcy. Chief Justice Winslow was one. He very fully expressed it in this language: 'Of this number five were reversed on the merits, six for erroneous rulings on evidence, thirteen for errors in instruction or refusal to instruct.'

"Chief Justice McLean of Iowa replied: 'In 199 appeals there were 53 reversals; eighteen on erroneous instructions, eleven insufficient instructions, nine erroneous admission or exclusion of evidence.'

"The Chief Justice of Georgia responded as follows: 'On errors in instructions, admission or rejection of evidence, 240 affirmed, 37 reversed.' The exact figures are very desirable, but the committee in the length of time that we had could not think of undertaking that task."

Judge Reid, of Wisconsin: "I was a little surprised at the figures for the reason that I have examined the reports for the last two and a half years in Wisconsin, and there were 36 cases reported in the last eight volumes. Out of these 36 there were only two reversals—that is, two reversals where a new trial was granted. There was one reversal on a writ of error taken by the state."

President: "This report covers five years, and certainly in last two or three years the proportion in Wisconsin is much lower. I have not the exact figures, but I have no doubt Judge Reid is right. Whether the court has seen the light or not I leave to your own judgment. During that five years the legislature has passed an Act which the court has used and honestly attempted to put into operation; that is an Act which specifically, both in civil and criminal cases requires that the Appellate Court shall not reverse a case for procedural error unless it appears that there has been substantial injury to the defeated party.

"Now, that question has been touched upon here, whether the Appellate Court can do that, that is, whether the Appellate Court sitting and simply seeing the printed record can be sure that it knows whether an error is substantially prejudicial. It truly is a difficult question; and yet it does seem that there must be some such rule, if the Appellate Court is to be something more than a court where mere logic is to be chopped. After an experience of 20 years on the Appellate Bench, it seems to me that with reasonable certainty an Appellate Judge who examines the case carefully can say whether or not most of the errors which are charged to have been committed, or which may in fact have been committed, are of such class.

"I think that is a thing which the Appellate Courts of this country must come to ultimately.

"That matter of having so large a percentage of cases reversed on erroneous instructions or refusal to instruct seems to me very interesting; and it makes this second recommendation of the committee of course a very important one. In this state the trial judge has the right to charge juries orally, and always has had, though most of them I think are given in writing. But this

attracts me: the requirement that the exception must be taken in the presence of the jury and before it has retired from the box. In the presence of the jury would seem almost to justify Professor Higgins in his objection—in the presence of the jury. If I should go up and whisper an objection to the judge, that could hardly be said to be in the presence of the jury in any fair sense. But my attention is called to that expression before the jury has retired from the box. There are sometimes quite serious legal questions arising in criminal cases. Is not that an extreme requirement of the defendant's attorney, that he should take his exceptions before the jury has retired from the box? I grant you that it seems to me that he ought not to be allowed to take it weeks afterward, at any time during the term. There is an abuse there, of course."

Judge Gemmill: "I think it was intended that he must make his objection before the jury has retired from the bar."

President: "You mean the objection must be made?"

Judge Gemmill: "Yes."

President: "Is that the idea?"

Judge Gemmill: "Yes, and that is the way it was originally drafted."

President: "Is it the idea that it should be made in open court, so that all can hear it?"

Judge Gemmill: "In open court. That is the federal practice and the federal statute. It means that the objection, whatever it is, must be made before the jury has retired from the bar, made in open court, so as to be heard by all. That is the statute of our own and some other states."

President: "That might work injustice perhaps at some time. You take a criminal case, where a number of close legal questions arise; the defendant possibly is defended by a young lawyer or perhaps by one who does not think quickly. This requires him to jump to his feet at the moment the charge is completed and make his objection. It seems to me that that is requiring a good deal, and perhaps too much. Why should it not be sufficient if it were required to be made before the jury had returned a verdict, and at such time that the trial judge might correct it? The jury is out sometimes for hours; and in such case as I have mentioned, where there is an inexperienced attorney looking over the charge or having it read by the reporter, he discovers that here is something quite important to which he failed to make objection. The jury is still out; and if he then calls the attention of the court to it, the court has ample time to remedy the error if there is one."

W. O. Hart, New Orleans: "I notice on page 120 that from my own state of Louisiana, the statement is made that most reversals are caused by improper arguments of district attorneys and erroneous rulings of trial courts. I recall only one case where the verdict of the jury was set aside because of improper argument of the district attorney. Most of the cases reversed with us, as stated here, are on erroneous rulings of trial courts. In our state the Supreme Court has jurisdiction in criminal cases where the punishment is death, imprisonment at hard labor, or a fine not less than $300, or imprisonment for at least six months; but this jurisdiction covers only the law. The Supreme Court has no jurisdiction of the facts; and if the trial judge has trenched upon the facts in any form, that would be cause for reversal. Our Supreme Court has held that no matter what the error may be, the judgment will be reversed and

the verdict set aside and the case remanded, upon the theory that it is impossible to tell how far the error may have influenced the jury in its verdict.

"Now, in reference to the charge, under our law it must be in writing if requested by the defendant; but the Supreme Court has held that if the charge is taken down by the stenographer as given by the judge, that that is a charge in writing; and that is the course usually followed regarding objections that must be made in the presence of the jury and in open court, so that everybody can hear." * * *

Mr. Bird, of Wisconsin: "One sufficient reason for not concurring in the recommendation to limit exceptions to the charge, and objections by counsel to the time of the charge is, that in my judgment, the question of exceptions is not a matter of legislative reclamation at all. We are getting to the point where we must leave that to court rules. I think also, that such legislation as is proposed and as they have in many states would not be efficacious. The result will be that it will force us as practicing attorneys, in order to be on the safe side, to go up and except seriatim to the charge. Nothing is thus accomplished except that we have got ourselves in a position to urge objections later; and if we have a little time to take exceptions, as we do, that usually cuts out many objections that we would otherwise make."

It was moved by Mr. Bird that the latter part of the second recommendation of the committee be not concurred in.

Judge Carter, Chicago: "I have no hard and fast opinion on this question. I think a resolution of this kind should not be adopted. I am not in favor of adopting any recommendation with reference to this report. In my judgment it should be held as a matter of information rather than recommendation, especially as only a few of the members are here, and you can see there is a wide divergence of view. I have had a great deal to do with written instructions, and I have positive views on the question; but you cannot make any hard and fast rule. My own idea was, and I think that this was the purpose of the Institute, not so much in our meetings here to propose certain things to be done, but to give a fund of information that all the states and all the country can draw from." * * *

Mr. Bird's motion was then withdrawn and the report of the committee was referred to the executive board.